C/015/025 Incoming
cc: Steve Alder

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UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS

COP COAL DEVELOPMENT COMPANY, Appellant. (Appeal from a decision by the Utah State Office, Bureau of Land Management, approving a Modification of the Resource Recovery and Protection Plan for the Continuous Miner Pillar panels in the Castle Valley nos. 3 and 4 Mines within the Bear Canyon Logical Mining Unit. UTU-73342)	IBLA 2011-111, 112 (and consolidated cases) **MOTION FOR RECONSIDERATION and MOTION FOR REFERRAL TO AN ALJ FOR SUBMISSION OF EVIDENCE** **[Oral argument requested]** 3482 (UTG 023) UTU-73342 (LMU) U-020668 (Lead Coal Lease)

Mindful of the extraordinary character of this request, pursuant to 43 C.F.R. § 4.21(d), C.O.P. Coal Development Company, ("COP"), hereby requests reconsideration of the Board's ruling of June 21, 2012, affirming the decision of the Utah State Office, Bureau of Land Management, approving certain modifications to the Resource Recovery and Protection Plan

(R2P2) for the Castle Valley Nos. 3 and 4 Mines within the Bear Canyon Logical Mining Unit (LMU) No. UTU-73342. For the reasons set forth below, COP also moves to have the matter referred to an ALJ for fact-finding on certain critically relevant facts, before the Board then issues its final Order.

The regulation at 43 C.F.R. §4.403(c) requires that a Motion for Reconsideration include the extraordinary circumstances that warrant reconsideration and must include all arguments and supporting documents.[1] The regulation at 43 C.F.R. §4.415 states that any party may file a motion to refer the case to an administrative law judge and requires that such a motion state the specific issues of fact to be dealt with, the evidence to be presented and/or cross-examined, the witnesses to be presented, and describe any documentary evidence requiring explanation. The discussion presented below demonstrates that both regulatory requirements are satisfied. In sum, COP submits that factual issues must be determined before a final decision can be fairly reached, and that when the true facts are established, the Board's own precedent in *Cyprus Shoshone Coal Corp.*, 143 IBLA 308 (1998), actually supports COP's position on maximum economic recovery (MER) under the 1920 Mineral Leasing Act and the implementing regulations.[2]

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[1] COP has set forth its arguments and supporting documents in its various appeal pleadings in this and related appeals (as discussed more fully below). Nonetheless, in order to comply with the regulations, COP incorporates, by reference, the arguments set forth in its Statements of Reasons in Appeals 2012-137 and -138. Further, in order to comply with the regulations without burdening the Board with yet another set of the voluminous documents related to these appeals and arguments, COP submits, together with this Motion, a CD containing .pdf copies of all the documents submitted in support of its appeals and, therefore, in support of this Motion (with the exception of the additional documents attached hereto). Reference to the documents on the CD will identify the document at issue, followed by: "*CD, Tab __,*" for the Board's convenience. If the Board requires hard copies of those documents to be submitted, COP will gladly do so.

[2] The Board's Order of June 21, 2012, dealt with the merits of appeal nos. 2011-111 and 2011-112. Its ruling of August 6, 2012, the Board also affirmed the decisions in appeal nos. 2012-039 and 2012-052. Also pending in these related appeals are appeal nos. 2012-137 and 2012-138, for which petitions for stay have also been filed. Motions to consolidate all of these appeals have been filed. By order dated March 15, 2012, the Board consolidated 2011-111, 112, 2012-039, and 052. The motion to consolidate 2012-137 and 138 is still pending. Because the Order of June 21, 2012, dealt with the merits of the 111 and 112 cases, which are central to all of the subsequent appeals affecting

A. THE NEED FOR FACT-FINDING.

1. Economic Necessity v. High-grading and Waste.

The crux of COP's concern in these and the related appeals boils down to a few essential facts – facts that have been presented with diametrically opposite casts by COP and Castle Valley in the various pleadings filed in these consolidated cases. COP is concerned that misrepresentations and aspersions have detracted from a fair and objective review to date. In its pleadings, Castle Valley has incorrectly characterized COP's appeals as being motivated by spite and indignantly has urged the Board to make haste to decide these issues to prevent COP from causing it (and the Board) more trouble for—in its estimation—no worthwhile purpose. It even asserts, with minimal, conjectural (and unfounded) support, that COP "longwalled itself into bankruptcy," thereby asserting its view of the clear superiority of room-and-pillar mining in this context to maintain economic viability and implicitly if not overtly ridiculing COP's position.

COP, on the other hand, argues that the shift from longwall to room-and-pillar mining appears to have been motivated more by an effort to "high-grade" the mined coal, to the immediate short term economic interest of Castle Valley (within its limited operating term) and at the expense of true maximum economic recovery of valuable coal in the Tank Seam (and thereby adversely affecting eventual overall royalties to both COP and the United States). From COP's perspective, many tons of mineable, saleable coal are being left behind and abandoned by ongoing operations using the room-and-pillar method, as well as by subsequent decisions to avoid and bypass "higher ash coal." To COP, this action appears motivated by a desire to remove as much high quality coal as possible within the limited remaining term of Castle

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the Bear Canyon Mine, COP requests that further decisions on these related (and consolidated) appeals be stayed pending the resolution of this Motion for Reconsideration and Motion for Referral for Fact-Finding.

Valley's fixed operating rights, leaving otherwise valuable coal abandoned and impossible to recover, decreasing their overall royalty revenues, and leaving the expensive reclamation efforts to whomever comes after, all with the inappropriate approval of the BLM.

It may well be that COP's prior arguments with regard to due process are satisfied by the opportunity for administrative appeal in the instant proceedings, as the Board points out in its June 21, 2012, Order. The fact remains, however, that COP was shut out from the discussions between Castle Valley and the BLM, when its input might have been meaningful, and that the BLM, COP believes, was unduly influenced by factual input only from Castle Valley when the vital decisions were being made. Certainly, the BLM is entitled to rely on its own expertise, but certainly also, the BLM is not infallible and can be swayed by form, presentation, and mischaracterization of otherwise objective facts.

If given the opportunity, COP can and will refute Castle Valley's mischaracterization that long-wall mining was somehow responsible for the *involuntary* bankruptcy of the prior operator, C.W. Mining ("CWM"). In its Answer, Castle Valley glibly suggests that CWM "long-walled itself into bankruptcy."[3] This is a misstatement of the events leading up to the CWM involuntary bankruptcy, as explained in the following paragraphs.

As set forth multiple times in COP's appeal documents, the CWM bankruptcy was an involuntary bankruptcy proceeding, filed against it in January, 2008. Of the three petitioning creditors filing the involuntary bankruptcy, the largest (by a huge margin) was Aquila, Inc.[4] A

[3]Castle Valley made this remark (and thereby created the related inference) in its Answer. Since replies to Answers are expressly discouraged in the IBLA rules and regulations, COP relied upon its requested hearing as the appropriate opportunity to clarify Castle Valley's misstatement. Because COP was not granted a hearing, COP must address the issue here, requesting not only reconsideration but a formal hearing to address that and related issues.

[4] Aquila's claim was over $24 million. The other two claimants, combined, were less than $25,000.

copy of the Involuntary Bankruptcy Petition is attached hereto as Tab 1. Prior to the bankruptcy filing, Aquila obtained judgment against CWM for over $24 million in the United States District Court for the District of Utah, (*Aquila, Inc. v. C.W. Mining,* Case No. 2:05-cv-00555 (Judge Tena Campbell)). A copy of the Judgment is attached hereto as Tab 2. The Judgment was entered after a three-day bench trial in February 2007. The District Court entered extensive Findings of Fact and Conclusions of Law, a copy of which is attached hereto as Tab 3.

Several salient facts related to the Aquila lawsuit—and the general chronology of events--reveal why Castle Valley's attempts to link CWM's bankruptcy to its long-wall mining are both unfounded and improper. First, the Aquila lawsuit was filed in 2005 (as noted in the case number). CWM did not even submit its R2P2 seeking authorization to mine using the long-wall method until July 2006. *See Declaration of Charles Reynolds, dated March 20, 2012, CD Tab 6,* at 2-4 & Ex. A. The Findings and Conclusions indicate that all of Aquila's claims arose prior to 2005 when the lawsuit was filed. Second, in its lawsuit, Aquila claimed that CWM breached its contracts with Aquila by failing to supply the correct quantity and quality of coal. CWM raised defenses, including its argument that the *force majeure* clause in the contract excused its performance. CWM argued that the primary cause of failure to produce the coal was labor difficulties, specifically a "walkout" of approximately half of CWM's employees in 2003. The court recognized the impact of the labor dispute but found that certain other geologic problems with the Mine during that same pre-2005 time frame (hot spots, mud, roof collapses) may have also had an impact. *See Findings and Conclusions*, Tab 3, at 3-6.

All of these events occurred *prior* to CWM even *requesting* to mine with the long-wall method. Long-wall mining could not have possibly been an issue in the Aquila litigation

because it had not yet commenced. Nowhere in the Findings and Conclusions does the District Court even mention long-wall mining.

The court in the Aquila litigation concluded, among other things, that the *force majeure* clause did not excuse CWM from performing its contract and awarded judgment against CWM for $24 million on October 30, 2007.

With that judgment in hand, Aquila elected to file the Involuntary Bankruptcy Petition a few months later in early January, 2008, presumably as a method to enforce and attempt to collect on its judgment. Again, Aquila's judgment was based on its claims of breach of contract. Those claims had nothing whatsoever to do with long-wall mining. Based on these facts, therefore, Castle Valley cannot logically or legitimately assert that CWM "long-walled itself into bankruptcy," and any reliance on that argument by the Board was misplaced.

Likewise, if given the opportunity, COP will discredit Castle Valley's assertions that long-wall mining is inherently uneconomical in the Bear Canyon Mine. COP can and will show that the coal mined by C.W. Mining ("CWM") using long-wall equipment, even when it mined through the sandstone channel in panel 3, was sold at a profit and met all quality requirements under the contracts.[5] Longwall mining was a viable method of mining coal in the Tank Seam, and would have recovered significantly more saleable coal than will the room-and-pillar method. The difference is that the royalty holders, COP and the United States, will not obtain royalty

[5] As set forth in the various Declarations of Charles Reynolds in support of the related and consolidated appeals before the Board, CWM, as operator, was mining at a profit, using the long-wall method. *See, generally, Declaration of Charles Reynolds in Support of Statement of Reasons (IBLA 2012-039), dated Feb. 1, 2012; and Declaration of Charles Reynolds (IBLA 2012-039 and 052, consolidated), dated March 20, 2012, CD, Tabs 6 and 9.* Mr. Reynolds declarations of that fact, under oath, should be sufficient. The books and financial records of CWM are currently in possession of the bankruptcy trustee and not freely accessible by COP. Nonetheless, if the Board grants this Motion for reconsideration and approves COP's application to have the matter heard before an ALJ, COP will attempt to review and obtain copies of those financial records from the Trustee, through the bankruptcy discovery process.

payments for unproduced, wasted coal, while Castle Valley will maximize its immediate profits (during the term of its operating interest) and will even benefit financially by leaving the reclamation efforts to the next operator of the Mine.[6]

2. **MER Definition – As Applied to Imperfect Facts.**

The Board's Order of June 21, 2012, goes into great detail, quoting at length from the *Cyprus Shoshone* decision, about the precise definition of MER and how it is determined. COP acknowledges and supports the Board's description of the MER standard. There are, accordingly, really two definitions of MER, one that might be called an "operational" definition and another, which might be termed the "background standard." The operational definition simply means that once the BLM has made a decision on the mining plan and approved an R2P2, then subsequent mining in accordance with that plan is, by definition, in keeping with the MER standard. The background definition, however, is what is employed by BLM in reviewing the proposed plan, or proposed amendments thereto, and deciding whether to approve or disapprove such proposals. It is this background definition, or more precisely how this background standard was employed by the BLM in approving the shift to room-and-pillar mining that COP believes was in error and for which it now seeks reconsideration of the Board's June 21, 2012, Order. For the application of any standard can only be as sound as the facts to which it is applied, even if the standard itself is understood perfectly.

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[6] The tonnage production rates of the Mine are a matter of public record, and those documents are in the possession of the BLM. In January 2008, using the long-wall method, CWM was mining approximately 1.2 million tons per year. Castle Valley, using room and pillar, is now producing approximately 500,000 tons per year. If granted reconsideration and a hearing, COP will be able to present that documentation to the fact finder. It would seem, to COP (as a royalty owner) that the United States (as another royalty owner) would prefer—even insist—on a method of production that would net more than double the tonnage and, therefore, royalties, in its analysis of MER, as discussed in the following section.

Accordingly, a second reason for COP's Motion for Reconsideration and Motion for Referral for Fact-Finding is that the facts thus adduced will aid in an accurate assessment of whether MER is genuinely achieved by the shift to room-and-pillar mining under the complete definition of that term, as the Board has laid it out through its extensive quotes from *Cyprus Shoshone Coal Corp.* 143 IBLA 308 (1998).

The Answers filed by both Castle Valley and the BLM accuse COP of caring only about coal tonnage mined, without regard to the economic viability of the process. Again, COP fears that the Board's June 21, 2012, Order may have been swayed by this mischaracterization of COP's position and arguments. COP's prior pleadings did indeed focus on the fact that a great deal of coal would be bypassed by the room-and-pillar method, but nothing contained therein was ever intended to suggest, and indeed cannot fairly be read to imply, that Castle Valley should be expected to operate below profitability. That would be absurd.

On the other hand, there is also a difference between *reasonable* profitability and *maximizing* profits by means that abandon otherwise profitable coal. MER, "Maximum Economic Recovery," entails both concepts – "maximum" and "economic" – not "maximum profits." The 1920 Mineral Leasing Act is focused on maximum recovery of a limited resource to the extent that such recovery can be accomplished at a profit. This is the core of COP's concern about "high-grading" in Castle Valley's ongoing mining practices, greatly enabled by the touted "flexibility" of room-and-pillar mining, and about the subsequent decisions to avoid areas of higher ash coal altogether. COP submits that much such coal could be mined, blended with lower ash coal, and still meet the quality requirements of current contracts. Again, despite Castle Valley's rhetoric about C.W. Mining having "longwalled itself into bankruptcy," and

painting a picture of COP's "spite" and apparent ineptitude in such matters, COP would show at a hearing that such blending was the prior practice, that reasonable profits were consistently achieved by this means, and that these practices had *nothing to do* with the bankruptcy that led to Castle Valley's acquisition of its current term interest in mining operations. *See generally, Declarations of Charles Reynolds, CD, Tabs 6 and 9.* COP believes that the BLM was misled or misinformed as to certain critical facts when it approved the shift to room-and-pillar mining, facts which COP had no opportunity to present to the BLM at the time due to its being shut out of the process.

As a lessee of a mineral interest, Castle Valley owes a duty to its lessors, COP and the United States, to operate for their benefit as well as its own. Maximizing its own profits by high-grading the coal it mines, even though Castle Valley does pay a royalty on that coal, reduces the overall royalties the United States and COP eventually receive. Moreover, the coal thus abandoned is thereafter unprofitable to mine because it cannot be blended with higher quality coal. Castle Valley benefits in the form of higher profits during the limited term of its remaining contract interest, but the United States and COP suffer from minimized royalties over the entire life of the Mine, and MER is *not* achieved. The BLM is indeed entitled to rely on its own expertise, but even qualified experts can make errors, particularly when they are misinformed about things like profitability.

Is COP's argument for high-grading accurate? More accurate than Castle Valley's characterizations of COP as asking them to operate below the profit line? Where is the correct line for true "maximum economic recovery" of the coal? Was BLM perhaps misled in approving the shift to room-and-pillar mining by the misperception that COP's troubles were

caused by long-wall mining? These are questions that can be resolved appropriately only through a hearing, with full opportunity for evidentiary presentation and cross-examination.

The Board's detailed description of the factors involved in an MER determination suggest that it may share in Castle Valley's view of COP's motives and arguments. COP in fact acknowledges and supports the "economic" component of that definition. Its concern is that even when the correct legal standard is employed, incorrect facts to which that standard is applied, can (and COP believes have, as in the appealed decisions and the June 21, 2012, Order) led to an incorrect result. A fair hearing is needed, indeed essential.

3. **Procedural Irregularities.**

In its Answer in IBLA 2012-39 and -52, paragraphs 26-28, Castle Valley describes its application of July 29, 2011, for a minor modification of the R2P2 to accommodate more efficient mining around the sandstone channel. It then describes not one, but two, inspections by the BLM, confirming the reported need that led to BLM's approval of the July 29 application. COP must point out, however, that both of the inspections conducted by the BLM occurred in the months *prior to* Castle Valley's application for the minor modification. This questionable circumstance aside, COP submits that had the BLM in fact conducted an inspection *subsequent* to receiving the July 29 application, it would have been easily observed that the sandstone channel was rising at an angle such that it was already approaching being clear of, if not already clear of, the coal seam. From that point on, in other words, the sandstone channel was no longer a factor in mining any of the coal lying to the north and east (Panels 6-8).[7]

[7] COP's prior use of the word "disappearing" in this regard, seemingly–and inappropriately—mocked in the Board's June 21 Order, was simply intended to convey the idea that the sandstone channel lay on a gradient that led it up and out of the coal seam at or near the point where the 5th Left submain joined the 1st North Mains and was therefore

BLM's Answer in the 2012-039 and -052 appeals acknowledges that the inspections were conducted prior to receiving Castle Valley's July 29, 2011, request for minor modification, stating that the request was approved because the prior inspections had already confirmed the presence of the sandstone channel (BLM Answer of May 4, 2012, p. 8). BLM's Answer, however, downplays the significance of the fact that the January 7, 2011, Decision lying at the base of these consolidated appeals—the decision that approved the shift to room-and-pillar mining—was *premised* on the hypothetical extension of the sandstone channel throughout the remainder of the Tank Seam, and that the reduction in the projected overall coal recovery estimates were *premised* on this same assumption. COP must conclude, and believes that appropriate fact-finding will conclude, that the uncorrected reduction figures in projected coal recovery will ultimately act to cover or obscure the unnecessary loss of recoverable coal due to the shift in mining method. See Note 6, *infra*.

These are factual issues that need to be resolved by specific findings of fact, not bare assertions, aspersions and innuendoes. COP suspects that the Board's June 21 Order was inappropriately influenced by the false factual allegations asserted by Castle Valley, and to a lesser degree, by the BLM. COP requests reconsideration and a referral for fact-finding, with full opportunity for cross-examination, before the Board renders its final decision. Without fact-finding and cross-examination, the Board's decision is relying only upon a partial development

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simply not an issue in the Tank Seam from that point on. No reasonable projections of ultimately recoverable tonnage could be justified by the presumed presence of that sandstone channel, even though the January 7, 2011, Decision approving the shift to room-and-pillar mining was clearly premised on that incorrect assumption. The BLM has not corrected the projection figures to account for this fact, and the reduced projections serve to mask or hide the fact that hundreds of tons, perhaps over 1,000 tons, of coal will be abandoned through use of the room-and-pillar operations in the Tank Seam of the Mine.

of the evidence, a development which at this point is highly prejudicial to COP due to the misstatements of fact now in the record.

4. **Remedy.**

At this point in the process, with the shift to room-and-pillar mining already underway and the 1st North Mains having bisected all of the remaining panels in the Tank Seam, Castle Valley's assertions that it would be inherently uneconomical to now remove the room-and-pillar equipment and purchase and install long-wall equipment, are no doubt correct. This does not mean, however, that the royalty holders, COP and the United States, do not have a remedy. COP submits that at the end of the day, the only reasonable recourse will be for Castle Valley to pay royalties on the mineable but abandoned coal bypassed due to their shift to room-and-pillar mining and for other fact-based modifications to be made in the R2P2. COP will be reasonable about the outcome, but there is an inherent reduction in recoverable coal when one shifts from long-wall to room-and-pillar mining, and a great deal of additional coal is wasted when areas of higher ash coal (which can be satisfactorily "blended" to meet quality requirements) are intentionally bypassed. Castle Valley's pleadings implicitly acknowledge this fact in arguing and trumpeting the offsetting virtues of the room-and-pillar method (flexibility in dealing with obstacles, etc.). The BLM's Answer also acknowledges that long-wall mining generally recovers more coal than does the room-and-pillar method. BLM's Answer suggested that COP pulled the "25% reduction" figure "out of Charles Reynolds' hat," but numbers in that general range are considered representative of fact, due to differences in the amount of coal left behind when pillars are "pulled" in the room-and-pillar method. COP is prepared to document these conclusions before an administrative law judge, if it can but be afforded an opportunity to do so.

BLM's Answer of May 4, 2012, asserts that COP has presented "no evidence of high-grading" by Castle Valley's mining practices, but then goes on to acknowledge that Castle Valley "avoids" areas of high ash coal. But this is precisely the question. Why is "avoiding" areas of higher ash coal—coal which could be mined and blended with the lower ash coal and still achieve contractual quality requirements—not the same thing as "high-grading"? This is bypassed coal which, after being bypassed and abandoned, is indeed unmineable, but which, when left unmined, generates no tonnage royalty income to either COP or the United States. And this is COP's objection to Castle Valley's mining practices.

CONCLUSION

As noted, COP is aware of the extraordinary nature of requests for reconsideration before the Board, in general, and of this specific request in particular. As described herein, however, the facts of this case, the ongoing and growing nature of the harm to COP, and the patterns of subsequent BLM decisions affecting this Mine demonstrate that reconsideration of the Board's Order of June 21, 2012, is warranted. Moreover, certain highly material facts are in dispute, facts which the June 21 Order accepted as true or about which it accepted only one version of facts without the opportunity for presentation and cross-examination, material facts which COP believes to be in error. COP believes these circumstances and disputed facts warrant reconsideration and therefore also moves that the matter be referred to an Administrative Law Judge for findings of fact on the issues set forth herein, before the Board issues a final order.

COP requests that the matter be considered and reviewed as a whole, rather than in piece-meal fashion, for the whole picture looks rather different now than when COP filed its Statement of Reasons in Appeal 2011-112. The related BLM decisions also on appeal in these cases

addressing Castle Valley's continuing requests for R2P2 modification, have prompted additional helpful arguments and bases for COP's conclusions that all of these decisions are inappropriate. See particularly COP's arguments in its Statement of Reasons in IBLA 2012-137 and 2012-138, together with the exhibits attached thereto and/or referenced therein.

In light of these subsequent developments, COP requests that the Board's Order of June 21, 2012, be reconsidered at the same time the Board is deliberating on the merits of the more recent appeals and petitions for stay in IBLA 2012-137 and 2012-138.

DATED this 20th day of August, 2012.

SNOW, CHRISTENSEN & MARTINEAU

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on the 20TH day of August, 2012, a true and correct copy of the foregoing was delivered as noted below, in accordance with the applicable rules, to the following:

Interior Board of Land Appeals
Office of Hearing and Appeals
801 North Quincy St., Suite 300
Arlington, VA 22203
Fax: (703) 235-8349
(Original, *via Federal Express*)

Corey Heaps
CASTLE VALLEY MINING LLC
2352 North 7th Street, Unit B
Grand Junction, CO 81501
(*Via U.S. Mail*)

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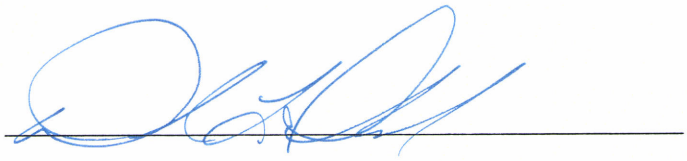

TAB 1

TAB 1

Official Form 5 (12/07)

United States Bankruptcy Court

Central District of Utah

INVOLUNTARY PETITION

IN RE (Name of Debtor – If Individual: Last First, Middle)	ALL OTHER NAMES used by debtor in the last 8 years (Include married, maiden, and trade names.)
C.W. Mining Company	**dba Co-Op Mining Company**
Last four digits of Soc. Sec. No./Complete EIN or other Tax I.D. No. (If more than one, state all.): **87-0399230**	
STREET ADDRESS OF DEBTOR (No. and street, city, state, and zip code) **53 W. Angelo Ave.** **Salt Lake City, UT 84115** COUNTY OF RESIDENCE OR PRINCIPAL PLACE OF BUSINESS **Salt Lake County, Utah**	MAILING ADDRESS OF DEBTOR (If different from street address) **P.O. Box 65809** **Salt Lake City, UT** **84165**

LOCATION OF PRINCIPAL ASSETS OF BUSINESS (If different from previously listed address): **Emery County, Utah**

CHAPTER OF BANKRUPTCY CODE UNDER WHICH PETITION IS FILED

☐ Chapter 7 X Chapter 11

INFORMATION REGARDING DEBTOR (Check applicable boxes)

Nature of Debts (Check one box.)	Type of Debtor (Form of Organization)	Nature of Business (Check one box.)
Petitioners believe: ☐ Debts are primarily consumer debts X Debts are primarily business debts	☐ Individual (Includes Joint Debtor) X Corporation (Includes LLC and LLP) ☐ Partnership ☐ Other (If debtor is not one of the above entities, check this box and state type of entity below.)	☐ Health Care Business ☐ Single Asset Real Estate as defined in 11 U.S.C. § 101(51)(B) ☐ Railroad ☐ Stockbroker ☐ Commodity Broker ☐ Clearing Bank X Other

VENUE

X Debtor has been domiciled or has had a residence, principal place of business, or principal assets in the District for 180 days immediately preceding the date of this petition for a longer part of such 180 days than in any other District.

☐ A bankruptcy case concerning debtor's affiliate, general partner or partnership is pending in this District.

FILING FEE (Check one box)

X Full Filing Fee attached

☐ Petitioner is a child support creditor or its representatives, and the form specified in § 304(g) of the Bankruptcy Reform Act of 1994 is attached. *[If a chilled support creditor or its representative is a petitioner, and if the petitioner files the form specified in § 304(g) of the Bankruptcy Reform Act of 1994, no fee is required.]*

PENDING BANKRUPTCY CASE FILED BY OR AGAINST ANY PARTNER OF AFFILIATE OF THIS DEBTOR (Report information of any additional cases on attached sheets.)

Name of Debtor	Case Number	Date
Relationship	District	Judge

ALLEGATIONS
(Check applicable boxes)

1. X Petitioner(s) are eligible to file this petition pursuant to 11 U.S.C. § 303 (b).
2. X The debtor is a person against who an order for relief may be entered under title 11 of the United States Code
3.a. X The debtor is generally not paying such debtor's debts as they become due, unless such debts are the subject of a bona fide dispute as to liability or amount;

or

b. ☐ Within 120 days preceding the filing of this petition, a custodian, other than a trustee receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

COURT USE ONLY

FILED IN THE UNITED STATES BANKRUPTCY COURT
2008 JAN -8 P 3:36
DISTRICT OF UTAH
DEPUTY CLERK

Official Form 5 (12/07) – Page 2.

Name of Debtor C. W. Mining Company
Case No. _____

TRANSFER OF CLAIM

☐ Check this box if there has been a transfer of any claim against the debtor or to any petitioner. Attach all documents that evidence the transfer and any statements that are required under Bankruptcy Rule 1003(a).

REQUEST FOR RELIEF

Petitioner(s) request that an order for relief be entered against the debtor under the chapter of title 11, United States Code, specified in this petition. If any petitioner is a foreign representative appointed in a foreign proceeding, a certified copy of the order of the court granting recognition is attached.

Petitioner(s) declare under penalty of perjury that the foregoing is true and correct according to the best of their knowledge, information, and belief.

x _____ (General Counsel & Corporate Secretary)
Signature of Petitioner or Representative (State title)
Aquila, Inc. January 7, 2008
Name of Petitioner Date Signed

Name & Mailing Address of Individual Signing in Representative Capacity: Chris Reitz, 20 W. 9th Street, Kansas City, MO 64105

x Keith Kelly Jan 8, 2007
Signature of Attorney Date
Keith A. Kelly, Ray Quinney & Nebeker P.C.
Name of Attorney Firm (If any)
36 South State Street, P.O. Box 45385, SLC, UT 84145-0385
Address
801-532-1500
Telephone No.

x _____
Signature of Petitioner or Representative (State title)
~~Mineral Reclamation Co.~~
Name of Petitioner Date Signed

Name & Mailing Address of Individual Signing in Representative Capacity: _____

x _____
Signature of Attorney Date
Name of Attorney Firm (If any)
Address
Telephone No.

x _____
Signature of Petitioner or Representative (State title)
House of Pumps, Inc.
Name of Petitioner Date Signed

Name & Mailing Address of Individual Signing in Representative Capacity: _____

x _____
Signature of Attorney Date
Name of Attorney Firm (If any)
Address
Telephone No.

PETITIONING CREDITORS

Name and Address of Petitioner	Nature of Claim	Amount of Claim
Aquila, Inc. **20 W. 9th Street** **Kansas City, MO 64105**	**Judgment entered by USDC, Utah 10/30/07**	**$24,841,988.00 (less payment of $275,000; + accruing post judgment interest)**
Name and Address of Petitioner ~~Mineral Reclamation Co.~~ ~~[illegible]~~	Nature of Claim ~~Trade Debt~~	Amount of Claim
Name and Address of Petitioner **House of Pumps, Inc.** **8510 S. Sandy Parkway** **Sandy, UT 84070**	Nature of Claim **Trade Debt**	Amount of Claim
Note: If there are more than three petitioners, attach additional sheets with the statement under penalty of perjury, each petitioner's signature under the statement and the name of attorney and petitioning creditor information in the format above.		Total Amount of Petitioners' Claims

____ continuation sheets attached

Official Form 5 (12/07) – Page 2.

Name of Debtor C. W. Mining Company
Case No. _____

TRANSFER OF CLAIM

Check this box if there has been a transfer of any claim against the debtor or to any petitioner. Attach all documents that evidence the transfer and any statements that are required under Bankruptcy Rule 1003(a).

REQUEST FOR RELIEF

Petitioner(s) request that an order for relief be entered against the debtor under the chapter of title 11, United States Code, specified in this petition.
If any petitioner is a foreign representative appointed in a foreign proceeding, a certified copy of the order of the court granting recognition is attached.

Petitioner(s) declare under penalty of perjury that the foregoing is true and correct according to the best of their knowledge, information, and belief.

x _____ Signature of Petitioner or Representative (State title) Aquila, Inc. Name of Petitioner Date Signed Name & Mailing Address of Individual Signing in Representative Capacity	x _____ Signature of Attorney Date Name of Attorney Firm (If any) Address Telephone No.
x _____ Signature of Petitioner or Representative (State title) ~~Minerals Equipment Co~~ Name of Petitioner Date Signed Name & Mailing Address of Individual Signing in Representative Capacity	x _____ Signature of Attorney Date Name of Attorney Firm (If any) Address Telephone No.
x Pres. Signature of Petitioner or Representative (State title) House of Pumps, Inc 1-7-08 Name of Petitioner Date Signed Name & Mailing Address of Individual: Court Winegar, 12111 Tuscany Creek Way Signing in Representative Capacity: President	x Keith Kelly Jan. 8, 2007 Signature of Attorney Date Ray Quinney + Nebeker Name of Attorney Firm (If any) 36 S. State St., PO Box 45385, SLC UT 84145-0385 Address 801-532-1500 Telephone No.

PETITIONING CREDITORS

Name and Address of Petitioner	Nature of Claim	Amount of Claim
Aquila, Inc. **20 W. 9th Street** **Kansas City, MO**	**Judgment entered by USDC, Utah 10/30/07**	**$24,841,988.00 (less payment of $275,000; + accruing post judgment interest)**
Name and Address of Petitioner ~~Minerals Equipment Co.~~ ~~1559 W. 3560 So.~~ ~~West Valley City, UT 84119~~	Nature of Claim ~~Trade Debt~~	Amount of Claim
Name and Address of Petitioner **House of Pumps, Inc.** **8510 S. Sandy Parkway** **Sandy, UT 84070**	Nature of Claim **Trade Debt**	Amount of Claim $19,255.62
Note: If there are more than three petitioners, attach additional sheets with the statement under penalty of perjury, each petitioner's signature under the statement and the name of attorney and petitioning creditor information in the format above.		Total Amount of Petitioners' Claims

____continuation of sheets attached

Official Form 5 (12/07) – Page 3.

Name of Debtor C. W. Mining Company
Case No. _____

TRANSFER OF CLAIM

☐ Check this box if there has been a transfer of any claim against the debtor or to any petitioner. Attach all documents that evidence the transfer and any statements that are required under Bankruptcy Rule 1003(a).

REQUEST FOR RELIEF

Petitioner(s) request that an order for relief be entered against the debtor under the chapter of title 11, United States Code, specified in this petition.
If any petitioner is a foreign representative appointed in a foreign proceeding, a certified copy of the order of the court granting recognition is attached.

Petitioner(s) declare under penalty of perjury that the foregoing is true and correct according to the best of their knowledge, information, and belief. x _____ Manager Exec. V.P. Signature of Petitioner or Representative (State title) OWELL PRECAST, L.L.C. 1/08/2008 Name of Petitioner Date Signed Name & Mailing Address of Individual Signing in Representative Capacity: Ryan Balls, P.O. 2347, Sandy, UT 84091	x _____ 1/8/08 Signature of Attorney Date Olsen Snow & Nielson LLC Name of Attorney Firm (If any) 45 W. 10000 So. # 300, Sandy UT 84070 Address 801-562-8655 Telephone No.
x _____ Signature of Petitioner or Representative (State title) Name of Petitioner Date Signed Name & Mailing Address of Individual Signing in Representative Capacity:	x _____ Signature of Attorney Date Name of Attorney Firm (If any) Address Telephone No.
x _____ Signature of Petitioner or Representative (State title) Name of Petitioner Date Signed Name & Mailing Address of Individual Signing in Representative Capacity:	x _____ Signature of Attorney Date Name of Attorney Firm (If any) Address Telephone No.

PETITIONING CREDITORS

Name and Address of Petitioner	Nature of Claim	Amount of Claim
OWELL PRECAST, L.L.C. 16500 S. 500 W. P.O. Box 2347 Sandy, UT 84091	Trade Debt	$3,440.00
Name and Address of Petitioner	Nature of Claim	Amount of Claim
Name and Address of Petitioner:	Nature of Claim	Amount of Claim
Note: If there are more than three petitioners, attach additional sheets with the statement under penalty of perjury, each petitioner's signature under the statement and the name of attorney and petitioning creditor information in the format above.		Total Amount of Petitioners' Claims $24,589,683.62

____continuation of sheets attached

961612v2

TAB 2

TAB 2

AO 450 (Rev.5/85) Judgment in a Civil Case

United States District Court

Central Division for the District of Utah

Aquila, Inc.

v.

C.W. Mining,
d/b/a Co-Op Mining Company

JUDGMENT IN A CIVIL CASE

Case Number: 2:05cv00555 TC

This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That judgement is granted in favor of the plaintiff: the court concludes that the defendant breached the Contract, and that the defendant has not shown that its failure to perform should be excused. The court awards Aquila, Inc. damages of $24,841,988.

October 30, 2007
Date

D. Mark Jones
Clerk of Court

(By) Deputy Clerk

TAB 3

TAB 3

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

AQUILA, INC., Plaintiff, vs. C. W. MINING, d/b/a CoOp Mining Company, Defendant.	**AMENDED FINDINGS OF FACT AND CONCLUSION OF LAW** Case No. 2:05-CV-00555 TC

INTRODUCTION

This diversity action arises out of a contract dispute between two companies, Plaintiff Aquila, Inc. ("Aquila") and Defendant C. W. Mining, Inc. ("CWM"). Aquila claims that CWM breached a coal supply contract ("the Contract") with Aquila and that Aquila was damaged by the breach. CWM has raised a number of defenses in support of its argument that its failure to fulfill its obligations under the Contract was excused. After a trial to the court, the court concludes that CWM breached the Contract, that CWM has not shown that its failure to perform should be excused, and that Aquila has suffered damages of $24,841,988.

FINDINGS OF FACT

A. The Parties

Aquila is a Delaware corporation with its principal place of business in Kansas City, Missouri. Aquila provides electric utility service in Missouri and Colorado and natural gas utility service to its customers in Colorado, Iowa, Kansas, and Nebraska. CWM is a Utah corporation and is in the business of coal production in Emery County, Utah.

B. The September 2003 Contract

In April 2003, Aquila was seeking a source of coal for two of its coal-fired power plants located in Missouri—the Lake Road and Sibley plants. When CWM expressed an interest, representatives of the two companies, Elden Kingston for CWM and Phil Rogers for Aquila, met and on September 16, 2003, they executed the Contract, which Aquila had drafted. (Pl.'s Ex. 1.)

The term of the Contract ran from January 1, 2004, to December 31, 2006, although Aquila had an option to extend the Contract for an additional two years (through December 2008). The Contract required CWM to deliver 450,000 tons of coal during 2004 and 550,000 tons of coal in 2005 and 2006. If Aquila exercised its option to extend the Contract until 2008, CWM was obligated to deliver 550,000 tons of coal in each of the two additional years. The Contract required Aquila to pay CWM $19.40 per ton in 2004, $19.99 in 2005, $20.59 in 2006, $21.62 in 2007 and $22.72 in 2008. The Contract included requirements concerning the quality of the coal to be delivered by CWM with certain price adjustments made based upon the quality. The Contract included a Force Majeure provision, which is discussed in more detail below.

C. Performance of the Contract and Force Majeure

CWM does not dispute that it failed to deliver the quantity and quality of coal required by the Contract. Specifically, CWM delivered only 127,807 tons of coal to Aquila in 2004 and 32,148 tons in 2005. After that, CWM delivered no coal to Aquila. Aquila is adamant that if CWM had tendered the amount of coal required by the Contract for those years, Aquila would have purchased it.

But CWM claims that its admitted failure to perform was legally excused. CWM's chief defense is that labor problems and geological problems interfered with its coal production and so

its performance was excused under the force majeure clause of the Contract. CWM also raises other defenses to excuse its performance.

1. The Labor Dispute

Charles Reynolds, a long-time employee of CWM and now the president, testified about CWM's coal production and the various problems CWM experienced during the life of the Contract. According to Mr. Reynolds, in 2001 and 2002, CWM's annual coal production was between 1 million and 1.2 million tons. CWM believed that it would produce the same amount in 2003 but would increase production in the next few years. CWM intended to use coal from its number one mine to fill its obligations to Aquila. At the time it entered into the Contract, the number one mine had approximately 1.8 million tons remaining, or about two year's worth of reserves. CWM also anticipated that in the future, it would be producing coal from its number three and four mines where CWM was just beginning to mine. (CWM's number two mine had been exhausted and was no longer in operation.)

CWM's labor problems began in September 2003 when between 50 and 70 of CWM's 120 employees walked out. Some left in protest over actions taken by CWM to discipline an employee, William Estrada, and some left because of dissatisfaction with wages and what the employees believed were inadequate benefits. But according to CWM, because CWM was a party to a collective bargaining agreement with the International Association of United Workers Union (hereinafter "IAUWU") which prohibited the workers from striking, CWM understandably believed that all labor issues would be quickly resolved.

CWM made efforts to hire replacement workers. Mr. Reynolds described those efforts:

> We contacted the job service office, let them know we needed employees. We also contacted the employees that were still working, let them know if they knew of anyone needing—that was interested in working, that we'd make jobs available. We also published ads for jobs in the local newspaper. And we—we

> contacted the company called price mine service, which is a mine contracting company that's in the Price area there to see if they had available contract workers.

(Transcript of Feb. 13, 2007 (hereinafter "Feb. 13 Tr.") at 166.)

CWM was able to hire between twenty-five and thirty replacement workers, six or eight of whom were full-time workers, the rest part-time. CWM, as part of an agreement that it reached with the IAUWU, prepared a list showing that as of April 1, 2004, it had only three job openings. (Pl.'s Ex. 67.)

2. Geological Problems

In addition to the labor problems, CWM was experiencing other problems which ultimately forced it to close the number one mine, losing the 1.8 million tons of coal it had anticipated producing for Aquila. First, in the fall of 2003, there were several roof collapses. Aquila claims that a shortage of manpower prevented CWM from fixing the roofs. But as a result of the roof collapses, in January 2004, the Federal Mine Safety and Health Administration (hereinafter "MSHA") ordered CWM to seal the number one mine. (The mine remains permanently sealed.)

At the time MSHA ordered CWM to seal the number one mine, neither the number three nor the number four mine was fully operational. But, as Mr. Reynolds explained, CWM still believed that it could meet all its contractual requirements. Mr. Reynolds testified:

> Now, we figured we were still okay as far as our contracts, but the production was going to be low for the next 60 to 90 days because we had to—there's a block of coal out here in this seam that has no coal above it. There's no coal in the tank seam over that area. And so we figured we could go in here and retreat this coal without affecting any reserves and it would still give us some retreat mining to meet our contracts with. And so in December of 2003 and January 2004 we began developing down into that block to generate a block to replace the reserves we had lost in the number one mine.

(Feb. 13 Tr. 175.)

Soon, though, CWM ran into trouble in the number three mine. Mr. Reynolds testified that:

> in mid-March, as we were developing south in the number three mine, we began to encounter coal that was extremely high temperatures. And as we continued to mine, we found we were mining into an area that appeared to be actively on fire. And so we made the decision to turn and try to go around that.

(Id. at 180.)

CWM was, at the same time, readying mine number four for production, but because the development was going slowly, CWM depended on coal from the number three mine to meet its requirements. But CWM was running into problems in the number three mine. Ken Defa, a long-time CWM employee, testified that as the miners advanced into the number three mine, "[t]he floor turned to mud, and we had a pretty tough time mining because of the muddy conditions." (Transcript of Feb. 14, 2007 (hereinafter "Feb. 14 Tr.") at 8.) According to Mr. Defa, he had never encountered so much mud in a mine throughout his thirty-eight years of mining. (Id. at 9.) The miners also ran into roof problems and hot spots in the number three mine.

Despite CWM's claim that its labor problems caused its inability to perform under the Contract, the evidence leads to the conclusion that it was a combination of the closure of the number one mine, the muddy conditions and the hot coal in the number three mine, and the fact that CWM had not begun full production from the number four mine, that accounted for CWM having only three job openings in April 2004. In fact, Mr. Reynolds testified that:

> the reason for the list being short at that time was we had encountered that hot spot in the one section, and we were working on the rock tunnel in the other section, and we had no other areas to put the employees to work at that time. And so that was the reason for the job list as short as it was.

(Feb. 13 Tr. 216.)

Moreover, the problems with the number three mine and the slow development of mine four appear to be the immediate reason that in April 2005, CWM notified Aquila that it was canceling the Contract. Mr. Reynolds testified, in response to a question why CWM cancelled the Contract, that CWM had again run into a hot spot in mine number three "[a]nd we could see there was no coal ahead of us in the near future that we could retreat . . . and we knew that we were not going to fill the—be able to fill the production levels because of that burnout and because of the hot zone there, that the reserves we thought we had were not there." (Id. at 185.)

D. Notice to Aquila

1. Written Notice

On December 22, 2003, CWM sent a letter notifying Aquila that because of "labor problems . . . [a]s per section 13 'Force Majeure' of our coal supply contract, we are notifying all of our customers that we may have to reduce our shipments over the next 60 to 90 days." (Pl.'s Ex. 4.) CWM wrote Aquila on April 8, 2004, that "due to the continued labor situation . . . [i]t appears that our 2d quarter 2004 production will be approximately 50% of normal." (Pl.'s Ex. 5.) On September 3, 2004, CWM sent Aquila "an update on the Force Majeure problems." (Pl.'s Ex. 6.) CWM discussed progress in "the current employment situation" and expressed optimism that because of an agreement with the National Labor Relations Board, CWM would soon "begin to get our labor force back to normal." (Id.)

Aquila wrote CWM on August 25, 2004, with questions about CWM's "most recent notice of Force Majeure dated April 8, 2004 . . . ." (Pl.'s Ex. 7.) Specifically, Aquila asked for information about the amount of coal CWM expected to send Aquila "during the fourth quarter of 2004 and calendar year 2005, together with any other information that will enable Aquila to adequately cover expected short positions in a timely manner." (Id.) Aquila also asked for

information about CWM's "plan to mitigate or remedy its labor disputes that could affect its ability to perform under the Agreement for the fourth quarter of 2004 and calendar year 2005." (Id.)

In a letter dated April 18, 2005, CWM wrote Aquila that it was terminating the Contract:

> [d]ue to the fact that we have not been able to fulfill our tonnage requirements, and it appears that this problem may be extended throughout a good part of this year, it was decided at a recent meeting of the board of directors, that we should cancel this contract as per paragraph 13B "If a Force Majeure continues for more than six (6) months then either party may terminate this Agreement by giving written notice to the other party without penalty or cost."

(Pl.'s Ex. 10.)

In the same letter, CWM offered to continue producing coal for Aquila under a new contract: "[w]e would still be very much interested in discussing a new coal supply agreement that would take into account our present production, then increasing our production when this Force Majeure problem is solved." (Id.) Aquila declined CWM's offer.

It is undisputed that in all of its written notices to Aquila, CWM did not refer to anything other than its labor problems as a force majeure event. In fact, in a letter CWM sent Aquila two months after it canceled the Contract, CWM described only the labor problem as a force majeure. (Pl.'s Ex. 9.)

2. Actual Notice

Even though CWM did not send written notice to Aquila of any of CWM's other problems, Aquila learned about them. In March 2004, Phil Rogers visited the CWM mining operation. Charles Reynolds told Mr. Rogers that mine number one was closed, showed him maps of mines three and four, and took him to inspect mine three. On a later visit to CWM in June 2004, Mr. Reynolds took Mr. Rogers into both mines three and four and discussed with Mr.

Rogers the hot spots and muddy conditions. But no one from CWM told Mr. Rogers that CWM considered these to be possible force majeure events.

E. Purchase of Cover Coal by Aquila

When CWM did not deliver all the coal required by the Contract, Aquila purchased coal on the "spot market" in 2004 and 2005. Once Aquila had been notified in April 2005 that CWM was canceling the Contract, Aquila found another long-term supplier, Consolidated Coal Company. Because the market price for coal had gone up since Aquila and CWM entered into the Contract, Aquila paid more for the replacement coal it bought.

The terms of the Consolidated Coal contract were less favorable to Aquila than those of the Contract. In addition to costing more, the coal from Consolidated Coal had a higher sulfur content than the coal called for in the Contract, which forced Aquila to buy sulfur emission credits before it could burn the coal.

CONCLUSIONS OF LAW

CWM does not dispute that it failed to deliver the required amount of coal. But CWM asserts several defenses that it claims excuse its failure to perform. It is CWM's burden to establish its affirmative defenses by a preponderance of the evidence. Gennari v. Prudential Ins. Co. of America, 335 S.W.2d 55, 60 (Mo. 1960).[1] CWM's chief defense is that its performance was excused under the Contract's force majeure provision.

1. CWM has Failed to Prove that its Performance was Excused as a Force Majeure.

Section 12(A) of the Contract defines "force majeure" as "any and all causes beyond the reasonable control of the party failing to perform . . . . " (Pl.'s Ex. 1, § 13(A).) The event must

[1]The Contract provides that it will be construed and interpreted using Missouri law. (Pl.'s Ex. 1, § 13(A).)

"wholly or partly prevent or make unreasonably costly (I) the mining, delivering or loading of coal . . . ." (Id.)

If a party is experiencing a force majeure, section 13(B) excuses that party's performance with certain limitations:

> If, because of any Force Majeure, either party hereto is unable to fulfill any of its obligations under this Agreement, and if such party shall promptly give to the other party concerned written notice of such Force Majeure, then the obligation of the party giving such notice shall be suspended . . . .

(Id. at § 13(B) (emphasis added).)

Although CWM maintains that its various problems were force majeure events under the Contract, that these events lasted six months and therefore, its performance was excused, the court concludes that CWM has failed to show that the force majeure provisions of the Contract excused its performance.

First, CWM never gave Aquila written notice that it considered the hot spot, the closure of the number one mine, the roof collapses or the muddy conditions force majeure events. The fact that Aquila knew of these other problems does not excuse CWM's obligation under the Contract to notify Aquila, in writing, that it considered these events as force majeure events. (Moreover, Aquila did not know that CWM considered these conditions as force majeure events.) The Contract specifically required, in Section 13(B), that written notice of any force majeure be given in writing. The necessity of written notice is repeated in Section 15(A): "[a]ny notice, request, consent, demand, report or statement which is given to or made upon either party hereto by the other party hereto under any of the provisions of this Agreement shall be in writing unless it is otherwise specifically provided herein . . . ." (Id. at § 15(A).)

Because the parties expressly agreed that written notice of a force majeure event must be given in order to excuse CWM's performance, and no written notice was given, CWM's failure to perform is not excused by the closure of the number one mine, the hot spots, muddy conditions and roof collapses.

Even though CWM did provide Aquila written notice of its labor problems, CWM has not met its burden of showing that the labor problems by themselves excuse CWM's failure to perform. Although the labor problems had some impact on CWM's coal production, how much impact is not clear. In fact, the evidence leads the court to conclude that CWM's failure to perform was caused, primarily, by its various geological problems and not by the labor dispute. Accordingly, CWM cannot rely on the force majeure provision of the Contract to excuse its failure to perform.

2. CWM's Defenses of Impossibility of Performance, Frustration of Purpose, and U.C.C. § 2-615(a) Do Not Excuse CWM's Failure to Perform.

In addition to its reliance on the force majeure provision of the Contract, CWM maintains that its performance is excused by the defenses of impossibility of performance, frustration of purpose and Uniform Commercial Code (hereinafter "U.C.C.") § 2-615(a). CWM points to the same conditions that were the basis of its force majeure defense to support these additional defenses, that is, the labor problems and various geological problems and conditions.

The defenses of force majeure, impossibility of performance, frustration of purpose, and U.C.C. § 2-615(a) are closely related, if not identical. The Restatement (Second) of Contracts treats them together under the heading "Discharge by Supervening Impracticability." Restatement (Second) of Contracts § 261 (1981). The importance of this is that the parties specifically set the terms and conditions, in the force majeure provisions of the Contract, when supervening events would excuse performance. Section 13(A) requires that the event must

"wholly or partly prevent or make unreasonably costly (I) the mining, delivering or loading of coal . . . ." (Pl.'s Ex. 1, § 13A.) And Section 13(B) imposes a written notice requirement. As discussed, CWM failed to establish that it met either of those requirements. And CWM cannot rely on common law defenses and the U.C.C., thereby circumventing the terms and limitations that the parties negotiated in the Contract.

Accordingly, because CWM has failed to establish that its performance is excused by the force majeure provisions, CWM's performance is not excused under the defenses of impossibility of performance, frustration of purpose, and U.C.C. § 2-615(a).

3. CWM has Not Proved Waiver or Estoppel.

CWM contends that when Aquila continued to accept coal shipments from CWM that were less than the required amounts, it either waived its claim that CWM breached the Contract or is estopped from asserting its claim. Other than Aquila's acceptance of the coal, CWM cites to no evidence in support of these arguments. And Aquila's continued acceptance of incomplete shipments of coal from CWM is understandable in light of CWM's continued assurances that its labor problems were temporary, thereby leading Aquila to believe that CWM would be in a position to ship all the coal that was required by the Contract.

Also, the plain language of the Contract does not support CWM's argument:

> The failure of either party hereto to insist in any one (1) or more instances upon strict performance of any provision of this Agreement by the other party hereto . . . shall not be construed as a waiver of it of any such provisions, or of the obligation to comply with such provisions in the future and the same shall continue and remain in full force and effect.

(Pl.'s Ex. 1, § 16(A).)

In addition, on August 25, 2004, Aquila sent a letter informing CWM "[f]or the avoidance of doubt, Aquila does not, with this letter and the requests contained herein, waive any

rights it has or excuse CoOp Mining from any obligations it has under the Agreement . . . ." (Pl.'s Ex. 7.)

Based on the evidence above, the court concludes that CWM has failed to establish either that Aquila waived its claim or is estopped from asserting its claim.

4. **CWM has Not Shown that Aquila Failed to Mitigate its Damages.**

CWM appears to argue that Aquila failed to mitigate its damages in two ways. First, that Aquila did not accept CWM's offer to enter into negotiations for a new coal supply agreement. Second, that Aquila could have purchased less expensive and better quality cover coal. Neither argument is persuasive.

In CWM's letter of April 18, 2005, telling Aquila that CWM was canceling the Contract, CWM wrote, in the last paragraph, "[w]e would still be very much interested in discussing a new coal supply agreement . . . ." (Pl.'s Ex. 10.) Aquila did not accept because, as Philip Rogers testified, "I did not consider them [CWM] to be a viable supplier of coal." (Feb. 12 Tr. 57.) Aquila's response and decision was justified given CWM's failure to perform its obligations under the Contract.

Aquila's purchase of coal on the spot market was also justified. Aquila believed, based on the reassurances of CWM, that CWM's failure to deliver the full amounts of coal was temporary. Aquila, did not want to enter into another long-term contract with another coal supplier because once CWM resumed complete deliveries, Aquila would be obligated to purchase more coal than it needed.

When CWM notified Aquila that it was canceling the Contract, Aquila entered into a long-term contract with Consolidated Coal. Abby Herl, who replaced Philip Rogers as director of coal procurement, explained the process Aquila followed in deciding whether to enter into the

agreement with Consolidated Coal. Based on Ms. Herl's testimony, the court concludes that Aquila carefully weighed its options and the competing bids and chose the contract that was the most advantageous to Aquila. CWM offered no persuasive evidence to counter that evidence.

Accordingly, the court finds that CWM has not shown that Aquila failed to mitigate its damages.

5. Aquila is Entitled to $24,841,988 in Damages.

Aquila claims damages of $53,742,89. In support of its claim, Aquila called an expert witness, Michael Lewis. Mr. Lewis testified that Aquila was financially harmed by CWM's breach of the Contract and that it will continue to be harmed through 2008. Mr. Lewis testified that Aquila's damages were the result of two factors. First (and most significantly), Aquila was forced to buy coal in an "unfavorable market" because "coal prices have just gone up significantly since the contract was struck." (Feb. 13 Tr. 26.) For example, Mr. Lewis testified that from December through late summer in 2004, the Uinta Basin coal price increased "significantly, going from . . . $17, $18 a ton to $30. And then again in July of '05—really June of '05 through the end of the year '05 the price of Uinta Basin coal went above about $35 or $37 a ton." (Id. at 28-29.) The second factor Mr. Lewis gave was that the replacement coal Aquila purchased had a higher sulfur content than the coal called for in the Contract. This forced Aquila to buy sulfur emission credits in order to burn the lower-quality coal.

Mr. Lewis separated his analysis of damages into three components. Mr. Lewis explained how he arrived at the first component:

> In my terms it's a but for analysis. We look at what the cost of Aquila acquiring coal would have been from C.W. Mining had they performed under the Contract for the amount of tons Aquila actually burned in the two plants, and we compare that to the amount that Aquila spent to actually buy the cover coal burn in those two plants.

(Feb. 14 Tr. 31.) According to Mr. Lewis, the present day value of that amount is $24,841,988. (Id. at 39.)

Because Aquila had an option to extend the Contract for an additional two years (through December 2008), Mr. Lewis calculated the difference between what Aquila projects it will have to pay for coal during that time and what it would have paid under the Contract. This figure, $15,893,379, is the second component. Mr. Lewis admitted that he didn't not know what the price of coal would be in 2008.[2] He also admitted that he did not know the sulfur content of the coal Aquila would purchase in 2008 and therefore, he did not know what would be the cost to Aquila of purchasing sulfur emission credits. Mr. Lewis averaged the price of coal for the last three years to arrive at a projected cost. He did the same to estimate the cost of purchasing emission credits.

The third component, Mr. Lewis explained, was based on the fact that Aquila had the right, under the Contract, to acquire more coal from CWM than it actually purchased and burned in 2004, 2005, and 2006. Mr. Lewis assumed, given the favorable terms of the Contract, that Aquila would have purchased the maximum amount of coal from CWM, had CWM performed, and either stockpiled the excess coal for later use or sold it to a third party, at market prices. Mr. Lewis testified that:

> [w]hat we looked at in coming up with the damages from component three is we compared and focused only on the difference between what it would have cost them to acquire those tons versus what they would have been able to sell them for or the value in the market, and whether they actually had stockpiled them or sold them to another source.

(Id. at 44.) The component three amount is $13,026,888.

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[2]In fact, as Mr. Lewis acknowledged, the price of coal, at least at the time of trial, was going down.

The component one damage amount, is the only component that is based on actual data. The price of coal and sulfur content were, as Mr. Lewis made clear, the two key factors in Aquila's loss. Mr. Lewis candidly admitted that he had to "forecast" what the price of coal would be in 2008. (Id. at 51.) Moreover, Mr. Lewis did not know the sulfur content of the coal that Aquila would be buying in the future, so, he had to estimate what Aquila would pay for emission credits.

The general rule of damages for breach of contract is that:

> the compensation should be equal to the injury, subject to the condition that the damages be confined to those naturally and proximately resulting from the breach, and be not uncertain or speculative, nor outside the contemplation of the parties.

Mayfield v. Richardson Mach. Co., 231 S.W. 288, 293 (Mo. App. 1921).

This proposition, set forth many years ago, has not changed. The Missouri Court of Appeals stated, in describing a claim for future profits, that in support of such a claim, "the evidence must be sufficiently definite and certain for the jury to make a reasonably accurate estimate of the loss without resorting to speculation. Because future profits are considered 'too remote, speculative and too dependent upon changing circumstances', our courts have viewed the recovery of such losses cautiously." Chmieleski v. City Prod. Corp., 660 S.W.2d 275, 298 (Mo. App. 1983) (internal citations omitted).

Because the court concludes that Aquila's second and third damage components are too speculative, the court awards Aquila damages of $24,841,988.

SO ORDERED this 30th day of October, 2007.

BY THE COURT:

Tena Campbell

Tena Campbell
Chief Judge